No. (1)

Supreme Court, U.S.
FILED

09-467 OCT 19 2009

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In The

Supreme Court of the United States

TERRY MICHAEL MILLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Jackson v. *Virginia* held that evidence supporting a criminal conviction is constitutionally sufficient only if a rational factfinder could find every essential element of the crime beyond a reasonable doubt. When reviewing claims of insufficient evidence for plain error, the en banc Tenth Circuit and five other courts of appeals apply Federal Rule of Criminal Procedure 52(b) in an analysis that is functionally equivalent to *de novo* review under *Jackson*. In contrast, the Fifth Circuit interprets Rule 52(b) to require a more stringent "manifest miscarriage of justice" standard that assesses unpreserved insufficiency claims only to determine if the record was "devoid of evidence pointing to guilt"; four other circuit courts have adopted that same standard. The question presented is:

Whether the Fifth Circuit, in conflict with six other courts of appeals, incorrectly defines the scope of review under Rule 52(b) by employing a standard under which an unpreserved challenge to the sufficiency of the evidence supporting a criminal conviction can succeed only if the record is entirely devoid of evidence pointing to guilt.

PARTIES TO THE PROCEEDINGS

The petitioner is Terry Michael Miller, the defendant and defendant-appellant in the courts below. The respondent is the United States of America.

Counsel of record for the petitioner is not a member of the Bar of this Court but was appointed to represent the petitioner on appeal pursuant to the Criminal Justice Act of 1964, 18 U.S.C. §3006A(b). App. 34; see Sup. Ct. Rule 9.1.

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Petitioner Terry Michael Miller respectfully asks the Court to issue a writ of certiorari to review the final judgment of the United States Court of Appeals for the Fifth Circuit. This case provides the Court the opportunity to explain the proper standard for plain-error review of sufficiency-of-the-evidence challenges and to settle an issue over which the circuits are in substantial, irreconcilable conflict.

Opinion and Judgment Below

The district court did not publish an opinion in this case. Its final judgment is reprinted in the Appendix at App. 11-24.[1] The court of appeals's *per curiam* opinion affirming the conviction is reported at 576 F.3d 528 and reprinted at App. 3-11.

Statement of Jurisdiction

The district court had jurisdiction under 18 U.S.C. §3231. Final judgment was entered on April 8, 2008, and a notice of appeal was timely filed on April 17, 2008. See App. 11-23; App. 30-31; Fed. Rule App. Proc. 4(b)(1). On July 21, 2009, the court of appeals issued a judgment affirming Miller's conviction, vacating his sentence, and remanding for resentencing; Miller did not file a motion for rehearing. This Court has jurisdiction under 28 U.S.C. §1254(1).

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[1] Citations in the form "App. ___" are to the petition appendix. Citations in the form "___ Supp. R. ___" are to the multi-volume supplemental record on appeal in the Fifth Circuit.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULE INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

The text of 18 U.S.C. §111 is lengthy and is reprinted at App. 24.

Rule 52(b) of the Federal Rules of Criminal Procedure provides: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."

STATEMENT OF THE CASE

Terry Miller was convicted on two counts of assaulting a federal officer with a dangerous weapon in violation of 18 U.S.C. §111(a) and (b). His convictions stemmed from a 2006 incident in which Miller attempted to flee agents of a joint federal-state task force when they sought to arrest him on a parole-violation warrant while he sat in an idling truck in the driveway of his grandson's house. Two agents were on the far side of cars they had parked partway across the driveway entrance when Miller drove between the cars. 9 Supp. R. 176-177, 226, 243-248. Though neither agent was in Miller's path when he began driving away, both feared the truck would hit them and jumped away from its path. 9 Supp. R. 184, 251-252. Neither agent was hit. *Ibid.* And before Miller had even reached the driveway entrance where

the two agents had parked their cars, Miller was shot in the face by other agents. 10 Supp. R. 442-443, 482. He then lost control of the truck, crashed, and was arrested. *Ibid.*

At trial, Miller's primary defense was that he lacked the intent to assault the agents, an essential element of the offense. 10 Supp. R. 533-535. Miller testified that he intended only to escape, that he never intended to hurt anyone, and that he never even saw the agent he came closest to hitting. 10 Supp. R. 477-478, 484-485. The defense also attempted to negate the voluntariness of Miller's actions by demonstrating Miller lacked the capacity to control the vehicle after being shot in the face. 9 Supp. R. 305-306, 392; 10 Supp. R. 477. Miller's counsel moved for a judgment of acquittal at the close of the government's evidence but failed to renew the motion at the close of all the evidence, thereby failing to preserve the issue of evidentiary sufficiency for appeal. The jury convicted on both counts.

On appeal, Miller challenged both his convictions and his sentence. The Fifth Circuit, in a *per curiam* opinion, recognized that the district court had plainly erred in convicting Miller on the two multiplicitous counts under §111, see *Ladner* v. *United States*, 358 U.S. 169 (1958), and vacated Miller's sentence. App. 9-10. However, the court of appeals upheld Miller's convictions against his unpreserved sufficiency-of-the-evidence challenge, holding the record was not "devoid of evidence pointing to guilt" on the specific issue of Miller's intent to assault and so finding no "manifest miscarriage of justice." App. 6.

Reasons for Granting the Petition

The Fifth Circuit and four sister circuits have contrived an incorrect standard of review for unpreserved evidentiary insufficiency claims that improperly narrows the plain-error standard of Federal Rule of Criminal Procedure 52(b). Under the settled practice of six other circuits, a court reviewing a forfeited sufficiency challenge for plain error first determines whether the alleged insufficiency would prevent a rational factfinder from finding every essential element of the crime beyond a reasonable doubt under the test of *Jackson* v. *Virginia*, 443 U.S. 307 (1979). If so, the court then assesses whether that error is plain, affects the defendant's substantial rights, and seriously affects the fairness, integrity, or public reputation of judicial proceedings—conditions that are typically satisfied once *Jackson*'s demanding standard is met. But that is not what the Fifth Circuit did.

Instead, under the harsher "manifest miscarriage of justice" interpretation of Rule 52(b) long-settled in the Fifth Circuit and applied in this case, when sufficiency is not properly preserved, a conviction will not be reversed for insufficient evidence unless "the record is devoid of evidence pointing to guilt." App. 5-6 (internal quotation marks omitted). This standard ignores or, at best, seriously misunderstands the framework for addressing errors under Rule 52(b) regularized by this Court in *United States* v. *Olano*, 507 U.S. 725 (1993), and it distorts *Jackson* beyond recognition. The Fifth Circuit is not alone in its error; four other courts of appeals apply the "devoid of

evidence" standard to forfeited sufficiency claims. This deep and entrenched split among the circuits over the proper standard of review has created confusion, disarray, and arbitrary differences in the treatment of appeals that only this Court's intervention can correct.

This case illustrates how the improper heightened standard effectively forecloses consideration of even those claims that would otherwise likely merit relief under a proper application of plain-error review. Accordingly, the case provides an ideal opportunity to explain the appropriate standard for plain-error analysis of insufficiency claims and dispel the confusion and inconsistency plaguing the courts of appeals.

I. THE COURT SHOULD GRANT THE WRIT TO RESOLVE THE CIRCUITS' DEEP SPLIT OVER THE STANDARD FOR REVIEWING EVIDENTIARY INSUFFICIENCY CLAIMS IN THE ABSENCE OF A RULE 29 MOTION FOR ACQUITTAL.

Plain error warranting correction through an appellate court's discretionary exercise of its authority under Rule 52(b) "must be (1) error, (2) that is plain, and (3) that affects substantial rights." *Johnson* v. *United States*, 520 U.S. 461, 467 (1997) (quoting *Olano*, 507 U.S., at 732; internal quotation marks, alteration omitted). "If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error 'seriously affects the fairness, integrity, or

public reputation of judicial proceedings.'"[2] *Ibid.* (quoting *Olano*, 507 U.S., at 732; alteration omitted).

But the Fifth Circuit applied a very different—and even more stringent—standard of review that did not even purport to be for plain error and that fundamentally misunderstands how this Court's Rule 52(b) framework should be put into effect. That standard, which is the subject of a deep circuit split, cannot be squared with a proper evaluation of *Olano*'s four-pronged plain-error analysis, and the application of the improper standard in this case likely affected the outcome on appeal.

A. The Existence of *Jackson* Error Is Virtually Determinative in a Proper Plain-Error Analysis Under Rule 52(b).

The Fifth Circuit's misinterpretation of Rule 52(b) errs in its effort to put flesh on the bones of the abstract analysis described in *Olano*. Conviction based on constitutionally insufficient evidence satisfies, without more, all four prongs of the Rule 52(b) framework in almost every instance. Accordingly, the proper analysis of forfeited insufficiency claims on plain-error review is functionally indistinguishable from a *de novo* review of such claims under *Jackson*.

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[2] "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.' . . . Mere forfeiture, as opposed to waiver, does not extinguish an 'error' under Rule 52(b)." *Olano*, 507 U.S., at 733 (quoting *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938)).

The first step of *Olano*'s plain-error analysis is satisfied by a defendant's demonstration that the evidence presented at trial was insufficient to permit a reasonable factfinder to find every essential element of the crime beyond a reasonable doubt, in violation of *Jackson*. See 443 U.S., at 318-319. This comports precisely with the familiar definition of legal error: "If a legal rule was violated during the district court proceedings, and if the defendant did not waive the rule, then there has been an 'error' within the meaning of Rule 52(b) despite the absence of a timely objection." *Olano*, 507 U.S., at 733-734. Simply put, a *Jackson* error is an "error" within the meaning of *Olano*'s first prong.

Evidentiary insufficiency that violates *Jackson*'s constitutional due process requirement also satisfies the second prong of the plain-error analysis. That an error is "plain" means that the error is "clear or, equivalently, obvious" "under current law." *Olano*, 507 U.S., at 734 (internal quotation marks omitted). In turn, "an error is clear or equivalently obvious if 'the settled law of the Supreme Court or th[e] circuit establishes that an error has occurred.'" *United States* v. *Maxwell*, 285 F.3d 336, 342 (CA4 2002) (quoting *United States* v. *Neal*, 101 F.3d 993, 998 (CA4 1996)). Moreover, "it is not always necessary for the party alleging plain error to cite a circuit or Supreme Court precedent precisely on point. . . . [T]he 'plainness' of the error can depend on well-settled legal *principles* as much as well-settled legal *precedents*." *United States* v. *Brown*, 352 F.3d 654, 664

(CA2 2003). A violation of the constitutional standard set out by this Court in *Jackson*, assuming such an error can be shown, is "clear" and "obvious" in this sense and certainly meets the second plain-error qualification.

Rule 52(b)'s third requirement, that the error must "affec[t] substantial rights," requires a demonstration that the error was prejudicial, that is, that it "affected the outcome of the district court proceedings." *Olano*, 507 U.S., at 734 (alteration in original). Conviction upon insufficient evidence in violation of *Jackson* is necessarily prejudicial in this sense: by definition, absent the error, conviction would not have been possible. See *United States* v. *Cruz*, 554 F.3d 840, 845 (CA9 2009) ("When a conviction is predicated on insufficient evidence, the last two prongs of the *Olano* test will necessarily be satisfied[.]"); *United States* v. *White*, 1 F.3d 13, 17 (CADC 1993) (meeting the *Jackson* standard even on *de novo* review "requires, by definition, that the error prejudice[s] substantial rights").

Finally, *Olano* instructs that the "Court[s] of Appeals should correct a plain forfeited error affecting substantial rights if the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" 507 U.S., at 736 (quoting *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936); second alteration in original). "Central to this inquiry is a determination of whether, based on the record in its entirety, the proceedings against the accused resulted in a fair and reliable determination of guilt."

United States v. *Cedelle*, 89 F.3d 181, 186 (CA4 1996); cf. *United States* v. *Cotton*, 535 U.S. 625, 633 (2002) (noting that "overwhelming and essentially uncontroverted" evidence supporting the challenged finding provides "no basis for concluding that the error seriously affected the fairness, integrity or public reputation of judicial proceedings" (quoting *Johnson*, 520 U.S., at 470; alteration omitted)).

This Court's many pronouncements about the critical importance and fundamental nature of the reasonable-doubt standard highlight just how seriously a conviction based on constitutionally insufficient evidence damages the fairness, integrity, and public reputation of the proceedings. Indeed, "[t]he question whether a defendant has been convicted upon inadequate evidence is *central* to the basic question of guilt or innocence." *Jackson*, 443 U.S., at 323 (emphasis added). As the Court stated in *In re Winship*,

> "[U]se of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." 397 U.S. 358, 364 (1970).

If the evidence fails to prove an essential element beyond a reasonable doubt, there is virtually no possibility that the error could be harmless or could otherwise be ignored without seriously damaging the

fairness and integrity of the judicial system. Rather, as has long been recognized, a conviction supported by constitutionally insufficient evidence cannot be said to have "resulted in a fair and reliable determination of guilt." *Cedelle*, 89 F.3d, at 186; see *Jackson*, 443 U.S., at 323.

Accordingly, the courts of appeals have repeatedly held that an uncorrected *Jackson* error "seriously affects the fairness, integrity or public reputation of judicial proceedings" and that a demonstration that the evidence is constitutionally insufficient to support a conviction will, barring exceptional circumstances, satisfy the fourth prong of the Rule 52(b) analytic framework. *E.g.*, *United States* v. *Franklin-El*, 555 F.3d 1115, 1124 (CA10 2009) ("[F]ailure to mandate reversal of a conviction resting on insufficient evidence in this case would seriously affect the fairness, integrity or public reputation of judicial proceedings." (internal quotation marks omitted)); *Cruz*, 554 F.3d, at 845 ("[T]he 'fairness' and 'integrity' of the courts[ ] are seriously affected when someone is sent to jail for a crime that, as a matter of law, he did not commit . . . ."); *United States* v. *Schaefer*, 501 F.3d 1197, 1207 (CA10 2007) ("[I]t will be the extraordinarily rare case where error that is predicated upon the insufficiency of the evidence will not adversely affect a defendant's substantial rights and seriously affect the fairness, integrity, or public reputation of judicial proceedings."); *United States* v. *Gaydos*, 108 F.3d 505, 509 (CA3 1997) ("[A]ffirming a conviction where the government has failed to prove each essential

element of the crime beyond a reasonable doubt 'affect[s] substantial rights,' and seriously impugns 'the fairness, integrity and public reputation of judicial proceedings.'" (quoting *Olano*, 507 U.S., at 732)); cf. *Maxwell*, 285 F.3d, at 342-343 (opining that "no court of justice would require a man to serve . . . undeserved years in prison when it knows that the sentence is improper" in the course of holding that it would be "fundamentally unfair" not to correct on plain-error review a sentencing error that imposed one additional year of supervised release).

Thus, for unpreserved claims of evidentiary insufficiency, the *de novo* and plain-error modes of appellate review are essentially indistinguishable. See *United States* v. *Gallant*, 537 F.3d 1202, 1223 (CA10 2008) ("[P]lain error analysis in this context . . . is essentially the same as our usual sufficiency-of-the-evidence analysis." (internal quotation marks omitted)). In this specific and narrow context, the four-prong plain-error test laid out in *Olano* functionally collapses into a *de novo* application of *Jackson* under the first prong, because the other three prongs will be satisfied once error of this type is successfully shown—because the settled nature of the law makes conviction upon insufficient evidence a clear and obvious error, because such a conviction necessarily prejudices the defendant's substantial rights, and because the flaw exposed by such error so severely undermines the fundamental fairness of the judicial process. Indeed, as the en banc Tenth Circuit

stated, it should be a "noncontroversial proposition that a conviction in the absence of sufficient evidence of guilt is plainly an error, clearly prejudiced the defendant, and almost always creates manifest injustice." *United States* v. *Goode*, 483 F.3d 676, 681, n.1 (CA10 2007) (en banc in relevant part).

B. The Circuits Are Starkly and Steadfastly Divided over the Proper Standard for Analyzing Plain-Error Sufficiency Claims.

Six of the courts of appeals—a majority of the circuits to address the question—have adopted a standard for plain-error review of insufficiency claims that follows this analysis. These courts, which directly apply *Jackson* to determine whether there is a plain error meriting correction, are:

- the Second Circuit, *e.g.*, *United States* v. *Allen*, 127 F.3d 260, 264-266 (CA2 1997) (applying the *Jackson* standard despite the defendant's failure to press his sufficiency challenge on appeal); *United States* v. *Qunbar*, Nos. 07-3516-cr, 08-2802-cr, 07-3537-cr, 08-2506-cr, 2009 WL 1874339, at *1 (CA2 July 1, 2009) (unpublished) (same);

- the Third Circuit, *e.g.*, *United States* v. *Mornan*, 413 F.3d 372, 381-382 (CA3 2005) ("In conducting plain error review, we . . . must sustain a jury's verdict if a

reasonable jury believing the government's evidence could find beyond a reasonable doubt that the government proved all the elements of the offenses." (internal quotation marks omitted)); *United States* v. *Wolfe*, 245 F.3d 257, 261 (CA3 2001) ("[T]he prosecution's failure to prove an essential element of the offense constitutes plain error under Rule 52(b). . . . We review the record in the light most favorable to the prosecution to determine whether any rational trier of fact could have found proof of guilt beyond a reasonable doubt based on the available evidence.");

- the Fourth Circuit, *e.g.*, *United States* v. *Green*, 296 Fed. Appx. 337, 338 (CA4 2008) (unpublished; *per curiam*) (on plain-error review, a "jury's verdict must be upheld on appeal if there is substantial evidence in the record to support it. In determining whether the evidence in the record is substantial, we view the evidence in the light most favorable to the Government and inquire whether there is evidence that a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt");

- the Eighth Circuit, *e.g.*, *United States* v. *Anderson*, 570 F.3d 1025, 1029-1030 (CA8 2009) (evidentiary insufficiency is correctable plain error "only if, when

viewing the evidence in the light most favorable to the verdict, no reasonable fact-finder could have found Anderson guilty beyond a reasonable doubt"); *United States* v. *Londondio*, 420 F.3d 777, 786 (CA8 2005) (same);

- the Ninth Circuit, *e.g.*, *United States* v. *Delgado*, 357 F.3d 1061, 1068 (CA9 2004) ("A [plain-error] challenge to the sufficiency of the evidence requires this court to determine if 'after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" (quoting *United States* v. *Carranza*, 289 F.3d 634, 641-642 (CA9 2002))); and

- the Tenth Circuit, *e.g.*, *Franklin-El*, 555 F.3d, at 1123-1124 (reversing conviction on forfeited sufficiency claim because "the evidence is insufficient for a jury to reasonably conclude beyond a reasonable doubt that Defendant was trying to obstruct justice"); *Gallant*, 537 F.3d, at 1223; *Schaefer*, 501 F.3d, at 1207.

In contrast to this majority consensus, four other circuit courts agree with the Fifth Circuit's erroneous position that, to warrant relief on an unpreserved insufficiency claim, a defendant must show not only that no rational factfinder could have found the essential elements of the crime beyond a reasonable doubt, see *Jackson*, 443 U.S., at 318-319, but that the record is entirely devoid of any evidence pointing

toward guilt. The courts of appeals employing this minority standard are:

- the Fifth Circuit, *e.g.*, *United States* v. *Green*, 293 F.3d 886, 895 (CA5 2002) (quoted in the decision below, see App. 5, n.2);
- the Sixth Circuit, *e.g.*, *United States* v. *Vasquez*, 560 F.3d 461, 469 (CA6 2009); *United States* v. *Abdullah*, 162 F.3d 897, 903 (CA6 1998);
- the Seventh Circuit, *e.g.*, *United States* v. *Irby*, 558 F.3d 651, 653 (CA7 2009); *United States* v. *Todosijevic*, 161 F.3d 479, 482 (CA7 1998);
- the Eleventh Circuit, *e.g.*, *United States* v. *Bichsel*, 156 F.3d 1148, 1150 (CA11 1998); *United States* v. *Adams*, 91 F.3d 114, 116 (CA11 1996); and
- the D.C. Circuit, *e.g.*, *United States* v. *Spinner*, 152 F.3d 950, 956 (CADC 1998).

These courts have erroneously adopted what is, essentially, a super-plain-error standard that unjustifiably goes well beyond the already significant burdens *Olano* places on defendants.

This entrenched division between the courts employing the majority interpretation of Rule 52(b) and those adopting the erroneous minority view has persisted for decades and needs no further development in the courts of appeals. Compare *United States*

v. *Bowie*, 892 F.2d 1494, 1497 (CA10 1990) (the appropriate Rule 52(b) standard is "essentially the same as if there had been a timely motion for acquittal" (citing *Corbin* v. *United States*, 253 F.2d 646, 648-649 (CA10 1958))), with *United States* v. *Ruiz*, 860 F.2d 615, 617 (CA5 1988) ("We are limited to the determination of 'whether there was a manifest miscarriage of justice.' Such a miscarriage would exist only if the record is 'devoid of evidence pointing to guilt.'" (quoting *United States* v. *Ivory*, 468 F.2d 613, 614 (CA5 1972))).

C. The Minority Devoid-of-Evidence Standard Concocts an Improper Exception to *Olano*'s Consistent Rule, Unjustifiably Imposes a Burden That Is Virtually Impossible to Satisfy, and Has Widespread Practical Consequences.

This Court has repeatedly admonished the courts of appeals that "the creation of an unjustified exception" to Rule 52(b) would be wholly inappropriate. *Puckett* v. *United States*, 129 S.Ct. 1423, 1429 (2009); accord *Johnson*, 520 U.S., at 466; see also *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 255 (1988) ("[F]ederal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions."). The devoid-of-evidence standard represents just such an "unjustified exception." As employed by the Fifth Circuit below, the standard is divorced from the

Olano framework for applying Rule 52(b) and imposes a far heavier burden on defendants than the one this Court has specified is allocated by that rule.

Rather than requiring defendants to demonstrate a *Jackson* violation and analyzing the plain-error consequences which properly flow from such a showing, the devoid-of-evidence standard unjustifiably forces defendants to make a far more stringent showing of error. That standard is indistinguishable from the one propounded in *Thompson* v. *City of Louisville*, 362 U.S. 199, 206 (1960) ("[W]e find no evidence whatever in the record to support these convictions. . . . [I]t [is] a violation of due process to convict and punish a man without evidence of his guilt."). But *Thompson*'s articulation of the devoid-of-evidence standard was the very standard for evaluating insufficiency claims that *Jackson* specifically and emphatically rejected as "simply inadequate to protect against misapplications of the constitutional standard of reasonable doubt." 443 U.S., at 320. The courts of appeals applying the devoid-of-evidence standard provide no rationale for reestablishing *Thompson*'s deprecated rule rather than simply applying *Jackson* and *Olano*.

And though a complete absence of proof of an essential element in violation of *Thompson* would almost certainly merit correction on plain-error review, just as most *Jackson* errors will, the first prong of *Olano* only requires defendants demonstrate "error," in the sense of an unwaived "deviation from a legal rule." 507 U.S., at 732-733. A demonstration of

Jackson error clears this hurdle. *Olano* imposes no requirement of super-error or a demonstration that the particular error alleged occurred in its most egregious form. Thus, although a *Thompson* error is certainly *sufficient* to warrant plain-error correction, nothing in this Court's plain-error jurisprudence even suggests that a complete failure of proof of guilt violating *Thompson* is *necessary* before a plain *Jackson* error should be noticed and corrected.

Equally pernicious is the Fifth Circuit's use of plain error as an excuse to turn away from *Jackson*'s injunction that "[t]he constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless." 443 U.S., at 323. Though *Jackson* insists that "even a thief is entitled to complain that he has been unconstitutionally convicted and imprisoned as a burglar," *id.*, at 323-324, the Fifth Circuit and others applying the devoid-of-evidence standard have determined instead, without any explanation or doctrinal basis in this Court's decisions interpreting Rule 52(b), that the thief should be deprived of that right should he fail to fully observe the procedural niceties of appellate issue preservation. That they do so as the automatic consequence of a technical and procedural forfeiture that, as in this case, may well not be ascribable to the defendant himself, rather than to the error of his trial counsel, serves merely to further undermine "the moral force of the criminal law" and "the respect and confidence of the community in [its] applications." *Winship*, 397 U.S., at 364.

In practice, the devoid-of-evidence standard is virtually impossible for defendants to satisfy, closely approximating the "rigid and undeviating judicially declared practice" of "invariably and under all circumstances declin[ing] to consider" unpreserved issues that this Court has long condemned as "out of harmony with the rules of fundamental justice." *Olano*, 507 U.S., at 732 (quoting *Hormel* v. *Helvering*, 312 U.S. 552, 557 (1941)). Conversely, the standard makes it disturbingly easy for an appeals court to find grounds to dismiss even meritorious claims of plain *Jackson* error and so, just as with *Thompson*'s identical standard, "could lead to absurdly unjust results." *Jackson*, 443 U.S., at 320, n.14.

Take, for instance, a case in which two possible inferences stand in equipoise, one pointing to guilt, the other to innocence. Under such circumstances, the courts of appeals have long held, "a reasonable jury must *necessarily* entertain a reasonable doubt" as a matter of law and *Jackson* requires reversal. *United States* v. *Glenn*, 312 F.3d 58, 70 (CA2 2002) (emphasis added); accord *United States* v. *Caseer*, 399 F.3d 828, 840 (CA6 2004); *United States* v. *Reveles*, 190 F.3d 678, 686 (CA5 1999); *Cosby* v. *Jones*, 682 F.2d 1373, 1383 (CA11 1982); *United States* v. *Delay*, 440 F.2d 566, 568 (CA7 1971); *United States* v. *Jones*, 418 F.2d 818, 826 (CA8 1969); see also *Penn R. Co.* v. *Chamberlain*, 288 U.S. 333, 339-340 (1933) ("[W]here proven facts give equal support to each of two inconsistent inferences . . . , neither of them being established, judgment, as a matter of law, must go

against the party upon whom rests the necessity of sustaining one of these inferences . . . ."). The very fact that some circumstantial evidence permits the inference pointing to guilt to be drawn, however, means that the devoid-of-evidence standard cannot be met.

Such circumstances arose in *United States* v. *Ortega Reyna*, 148 F.3d 540 (CA5 1998), in which the defendant, a possibly unwitting drug mule, challenged the sufficiency of the evidence supporting his drug-possession conviction. The Fifth Circuit was faced with a situation in which "for every inference of guilt that [could have been] drawn" from circumstantial evidence of the defendant's knowledge of the drugs hidden in his vehicle, "there was an equal and benign inference to be drawn." *Id.*, at 545-547 (considering the defendant's verbal and nonverbal responses at a Border Patrol stop, his lack of luggage and possession of $700 in cash, and the condition of his vehicle, and finding equally likely innocent explanations for each). On *de novo* review, the Fifth Circuit reversed the conviction, holding that the evidence of guilty knowledge was in equipoise, "mak[ing] it incapable, as a matter of law, of serving as the basis of a jury finding that Ortega's possession of illicit drugs was 'knowing' beyond a reasonable doubt." *Id.*, at 545.

But the result in *Ortega Reyna* would necessarily have been different under the Fifth Circuit's devoid-of-evidence standard had the case been presented on plain-error review. The defendant's lack of nervousness, his hesitation and his downcast eyes, his lack of

luggage, and his possession of cash would each have been independently sufficient to defeat plain-error review under the devoid-of-evidence standard, regardless of the relative weight of the countervailing inferences that could equally well have been drawn, because each would constitute at least a scintilla of evidence of guilt. See *id.*, at 545-547. The other circuits adopting the devoid-of-evidence standard would, in a similar case, likewise be forced to deny plain-error relief on facts that on *de novo* review would demand reversal. See *Caseer*, 399 F.3d, at 840; *Cosby*, 682 F.2d, at 1383; *Delay*, 440 F.2d, at 568.

Clearly, the burden imposed by Rule 52(b) could not have been intended to preclude the courts of appeals from even considering affording relief in a case in which, as a matter of law, the conviction would have been required to be set aside on a *de novo* review. Yet that is precisely the effect of the devoid-of-evidence standard adopted by the Fifth Circuit in this case. See Part I.D *infra*.

The clear differences between the devoid-of-evidence standard and the *Jackson* standard (as mediated by the Rule 52(b) analytic framework) translate into real-world effects that can have outcome-determinative impact: the unjustifiable burden allocated to defendants under the harsher minority standard "significantly limits [an appellate court's] review of the case." *United States* v. *Rock*, 370 F.3d 712, 714 (CA7 2004); accord *Irby*, 558 F.3d, at 653 (the devoid-of-evidence standard is "even more stringent" than *Jackson*); *Green*, 293 F.3d, at 895 (similar); see also

Ruiz, 860 F.2d, at 617 ("[T]his Court's review is not under the usual standard of review for claims of insufficiency of evidence but rather under a much stricter standard.").

Jackson recognized and condemned this outcome-determinative difference between its constitutional standard and the devoid-of-evidence standard the Fifth Circuit employed below. "'[A] mere modicum of evidence may satisfy a "no evidence" standard[.]' . . . But it could not seriously be argued that such a 'modicum' of evidence could by itself rationally support a conviction beyond a reasonable doubt." *Jackson*, 443 U.S., at 320 (quoting *Jacobellis* v. *Ohio*, 378 U.S. 184, 202 (1964) (Warren, C.J., dissenting)). The Court in *Jackson* thus clearly acknowledged, as the Fifth Circuit and other courts of appeals fail to, the possibility of a nonzero quantum of proof of guilt that is nonetheless insufficient to permit a rational factfinder to determine guilt beyond a reasonable doubt. And under the correct understanding of Rule 52(b), establishing that only that quantum of proof was presented is sufficient to demonstrate plain error warranting correction, even though a "modicum of evidence" of guilt was present. See Part I.A. *supra*.

The importance of the issue of the proper standard of review, and of the split among the circuits in addressing it, is further highlighted by the distressing frequency with which it arises. Even though nothing more is required to preserve evidentiary sufficiency for appellate review than a pro forma Rule 29 motion for acquittal and its renewal at

the close of all evidence or after the verdict—a function that has properly been labeled "the *sine qua non* of an adequate and competent defense," *United States* v. *Anderson*, 89 F.3d 1306, 1310, n.2 (CA6 1996)—even a cursory review of the Federal Reporter nevertheless unearths an (over)abundance of cases applying plain-error review to sufficiency claims. Indeed, there have been at least 270 reported decisions in the last twenty years in which a federal appellate court expressly noted a failure to preserve sufficiency as an issue and reviewed for plain error, to say nothing of the presumably far larger numbers of unreported cases or those that omitted explicit mention of the defendant's failure to preserve.[3]

In short, *Jackson* holds it is error of significant constitutional dimension to convict when no reasonable factfinder could have found guilt beyond a reasonable doubt. Nevertheless, the minority devoid-of-evidence standard will unquestionably deny plain-error relief to the set of cases where there actually is a *Jackson* violation but in which the prosecution did not completely fail to put on some evidence of guilt. Indeed, this is such a case.

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[3] Search performed on Westlaw.com on Oct. 9, 2009, database CTA, criteria: ("does not" "did not" fail!) /s (move renew) /s ("rule 29" acquittal) /p "plain error" & da(aft 1989) & ci("f.3d" "f.2d") & ca("united states").

D. The Fifth Circuit's Application of the Devoid-of-Evidence Standard Precluded the Proper Assessment of Miller's Plain-Error Sufficiency Claim.

The forcible assault of a federal officer engaged in official duties that is proscribed by 18 U.S.C. §111 is a general-intent crime; that is, the defendant's intent to assault is an essential element that must be proved by the government beyond a reasonable doubt. *United States* v. *Feola*, 420 U.S. 671, 684 (1975). Conviction thus requires proof that the defendant intended the assault and acted knowingly and willfully. See *United States* v. *Berrios-Centeno*, 250 F.3d 294, 299 (CA5 2001); App. 6 (acknowledging that acting "knowingly or willfully" "is the required mens rea for this crime"). Miller presented strong arguments below that as a matter of law the evidence was insufficient to prove, beyond a reasonable doubt, that he possessed the requisite intent for conviction. But the devoid-of-evidence standard of review applied by the Fifth Circuit precluded a fair assessment of this claim.

In particular, Miller argued that the circumstantial evidence presented by the government at most gave equal support to competing inferences that Miller acted with intent to assault and that Miller acted only recklessly. Under Fifth Circuit precedent binding on the panel below, a reasonable factfinder cannot, as a matter of law, find an ultimate fact like intent beyond a reasonable doubt when two conflicting inferences are of equal or nearly equal weight, which was one particular form of insufficiency argued

by Miller below. *Reveles*, 190 F.3d, at 686. There were in Miller's case, at most, conflicting inferences of intent or recklessness of equal circumstantial weight. The inference of recklessness with respect to the officers' proximity to Miller's truck's path that could be drawn from the evidence—which showed Miller was aware that officers were behind and well to either side of his truck, that the gap between the officers' cars was three-and-a-half times as wide as Miller's truck, and that no officers were in or near the gap when the truck began moving—was equally as strong as the conflicting inference of knowing and willful intent to assault. This evidence was insufficient as a matter of law to demonstrate beyond a reasonable doubt that Miller knew that the officers would reasonably believe themselves endangered by his actions, as opposed to demonstrating that Miller merely acted recklessly with respect to that fact.

Regardless, however, the Fifth Circuit's application of the devoid-of-evidence standard improperly foreclosed any consideration of Miller's contention that the inference of his recklessness was in equipoise with an inference of intent. The court's analysis was limited to noting only that Miller "[drove] his large vehicle very quickly in the[ ] direction" of the officers, implicitly finding this sufficient to provide at least a modicum of evidence from which the necessary inference of intent could be drawn. App. 7. The decision below thus neither ruled directly on the relative weight of the conflicting inferences, Miller's bottom-line insufficiency argument, nor employed the

correct plain-error standard by applying *Olano* and *Jackson,* under which Miller's argument would potentially have necessitated a different outcome.

CONCLUSION

The Court should grant the writ to resolve the split among the courts of appeals over the proper standard of review for forfeited sufficiency-of-the-evidence claims and clarify that under *United States* v. *Olano*, a demonstration that the evidence was constitutionally insufficient under *Jackson* v. *Virginia* is typically enough to show plain error warranting correction under Rule 52(b).

Respectfully submitted,

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Counsel of Record for Petitioner

OCTOBER 2009

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-50409

D.C. Docket No. 1:06-CR-125-ALL

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

TERRY MICHAEL MILLER,

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas, Austin

Before HIGGINBOTHAM, SMITH, and SOUTHWICK, Circuit Judges.

JUDGMENT

(Filed Jul. 21, 2009)

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed in part and vacated in part, and the cause is remanded to the District Court

for further proceedings in accordance with the opinion of this Court.

ISSUED AS MANDATE: Aug. 12, 2009

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 08-50409

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

TERRY MICHAEL MILLER,

Defendant-Appellant

Appeal from the United States District Court for the Western District of Texas

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(Filed Jul. 21, 2009)

Before HIGGINBOTHAM, SMITH, and SOUTHWICK, Circuit Judges.

PER CURIAM:

On February 8, 2006, eight members of the Lone Star Fugitive Task Force – an interjurisdictional coalition of law enforcement officers – waited near a home in Elgin, Texas, where Terry Michael Miller was visiting his grandchildren. Miller was a fugitive from justice, wanted for parole violations relating to previous sentences – in his fifty year lifetime, Miller had accumulated an extensive criminal history of 12 prior

felonies, including one for attempted murder. As Miller came out of the house, the officers flipped on their lights and pulled their cars toward the driveway where Miller had parked his green F-150 pickup. Miller's engine was running by the time the task force moved in. The officers exited their cars, guns drawn, wearing vests labeled POLICE or MARSHALS. Among others, the force included Austin Police officer Kevin Rybarski, deputized as special federal marshal, and Special Deputy U.S. Marshall Keith Sartin, who was leading the investigation; they were among the officers approaching Miller's car from the back.

At trial, Task Force members testified that Miller looked over his shoulder at the officers around him, including at Rybarski and Sartin. Then, with tires squealing, he reversed toward them, attempting to escape in the narrow gap between their cars. Rybarski jumped out of the way, seriously injuring himself; he says he escaped Miller's pickup by a foot. Sartin also jumped out of the way. As Miller backed up, two other officers opened fire. One of them, Soto, hit Miller, whose hands flew off the wheel. Miller's truck crashed and flipped. He was extracted from the vehicle and taken to Brackenridge Hospital in Austin. Miller suffered serious jaw, neck, and chest injuries. Testifying in his own defense, Miller claimed that when he began accelerating, he sought to avoid Sartin, and that he never saw Rybarski. He said that he lost consciousness as a result of the gunshot just after he began accelerating and does not remember anything else.

On May 1, 2007, a grand jury in the Western District of Texas returned a two-count superseding indictment of Miller, for two counts of attempted forcible assault against federal officers engaged in their official duties by use of dangerous weapon.[1] After a jury trial, Miller was convicted of the crimes, on January 17, 2008. On April 14, Judge Yeakel sentenced Miller to 240 months of imprisonment for each of the two counts, with 60 months of one conviction running consecutively to the other, for a total sentence of 300 months of imprisonment. Miller timely appealed, challenging the evidentiary sufficiency for his assault conviction, the exclusion of photographic evidence of his gunshot wounds, and the multiplicitous convictions emerging from a single act of assault.

I

Miller failed at trial to move for a judgment of acquittal at the close of all evidence, so our review is for manifest miscarriage of justice.[2] This demanding

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[1] 18 U.S.C. § 111.

[2] "Defendants' sufficiency of the evidence claims are reviewed under a stricter than usual standard, because none of the defendants renewed their motions for judgment of acquittal at the close of all evidence. Under the stricter standard, review is for a 'manifest miscarriage of justice,' which is found if the record is 'devoid of evidence pointing to guilt.'" *U.S. v. Green*, 293 F.3d 886, 895 (5th Cir. 2002) (*quoting U.S. v. Ruiz*, 860 F.2d 615, 617 (5th Cir. 1988)) (internal citation omitted); *see also U.S. v. Phillips*, 477 F.3d 215, 219 (5th Cir. 2007). Miller cites no law

(Continued on following page)

standard requires Miller to demonstrate that the record is "devoid of evidence pointing to guilt."

Miller argues that the government failed to demonstrate the requisite level of intent for the crime. He claims that the evidence fails to show that Miller intended anything more than escape between the police vehicles: at most, he acted recklessly with regards to the officers, not knowingly or willfully, which is the required mens rea for this crime.

The government responds with Task Force testimony that before he accelerated toward them, officers saw Miller look at Sartin and Rybarski, evincing clear awareness that his actions would endanger them. Given that Miller intended the acceleration and knew the acceleration was likely to result in grave harm to the officers, Miller manifested the requisite level of intent for conviction. Of course, his ultimate *motive* was to escape and probably not to injure officers, but this does not vitiate his ability to *intend,* in a legal sense, the assault as an intermediate matter, in that he knew that acts that he intended would in fact bring such harm.

Miller counters that when he stepped on the accelerator in his car, there is no competent evidence either that the officers were in the space into which Miller was driving, or more to the point, that Miller

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to the contrary; in fact the cases he cites support the government's position.

knew they were approaching that space. Miller continues that if, alternatively, the jury thought intent was formed *after* that point, that conclusion is foreclosed by the fact that Miller was shot early in the sequence of events and did not thereafter retain control of the truck.

Contrary to Miller's assertions, the government did not, at trial, rely on a theory of negligence or recklessness. Granting that the officers and Miller were all moving quickly in the heat of the moment, the government has produced sufficient evidence that Miller intended to assault Rybarski and Sartin by driving his large vehicle very quickly in their direction. Intent can be formed quickly, and the jury was not bound to accept Miller's account of the events surrounding his abortive escape over the accounts provided by the Task Force members.

II

At trial, Miller sought, unsuccessfully, to introduce a photograph of his wounds, apparently taken at Brackenridge shortly after the incident. The photograph, which we have reviewed in chambers, shows a bloody wound on the bottom of Miller's chin/jaw, stretching about halfway across his chin, and quite deep.

Miller claims that the extent of his wounds would have decisively convinced the jury that Miller could not possibly have formed the requisite intent or carried

out the requisite acts supporting the attempted assault. It would demonstrate, he argues, that he was unconscious at the relevant time, having sustained egregious injuries. He argues that the exclusion was prejudicial because the government consistently downplayed the extent of Miller's injuries at trial, insinuating that the shot merely "grazed" him, and in any case failing to convey the egregious nature of the injury.

This evidentiary ruling is reviewed for abuse of discretion. Miller's argument founders first on relevance. As the government notes, Miller could certainly have formed an intent to assault before he was shot, and this seems to have been the dominant theory at trial. Even if it were not, there was ample testimony concerning the severity of Miller's injuries,[3] and when the allegedly misleading statements from the prosecution are taken in context, there is simply no support for the idea that they systematically

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[3] This is part of a cross-examination of one of the officers:

Q: You stated that after the vehicle was on its top, you approached and you saw Mr. Miller's wound?

A: Yes, sir.

Q: Pretty severe wound?

A: Yes, sir, it was. . . .

Q: You just testified that you saw teeth, jaw. Pretty strong impact from that bullet?

A: Yes, sir.

Q: Pretty extensive damage, would you say?

A: I've seen stuff like that before, so, yes.

minimize Miller's injuries. The jury was made amply aware that as he accelerated toward the officers, Miller was shot in the face and lost control of his vehicle. The introduction of a gruesome photograph would have added very little to the picture of Miller's wounds no doubt already formed in jurors' imaginations, and in any case, it would not have aided at all in their determination of Miller's guilt or innocence.

There was no reversible abuse of discretion here.

III

Miller raises several sentencing errors, and the first alleged error – concerning duplicative attempted assault charges for a single act – is decisive.[4] Based on this error, as the government has conceded, Miller's sentences should be vacated, and the case should be remanded for resentencing. This is because under settled law, the single action of attempting to run over the officers cannot support two separate convictions.[5] Here, since the erroneous second conviction significantly lengthened Miller's sentence, he was clearly prejudiced by it. This unobjected-to error is

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[4] In light of our decision we pretermit consideration of the other alleged sentencing error.

[5] *See U.S. v. Shaw*, 701 F.2d 367, 396 (5th Cir. 1983) (citing to *Ladner* in interpreting this statute); *Ladner v. United States*, 358 U.S. 169 (1958) (overturning one of two convictions under the predecessor of this statute, because both officers were hurt by only one shotgun discharge).

subject to plain error analysis, and we choose to exercise our discretion to correct it.

We VACATE Miller's sentence and REMAND to the district court for further proceedings necessary to correct this error, and we AFFIRM the judgment below in every other respect.

AO 245 B (Rev. 06/05)(W.D.TX.)
– Judgment in a Criminal Case

UNITED STATES DISTRICT COURT
Western District of Texas
AUSTIN DIVISION

UNITED STATES OF AMERICA

v.

TERRY MICHAEL MILLER
True Name: Terry Michael Miller
Aliases: Mike Miller, Danny Miller, Larry Kevin Roberts, Kevin Roberts Larry, John Henderson, Rodney Marlett, Danny Vermeil Miller

Defendant.

Case Number
A-06-CR-125(1)-LY

USM Number
35111-177

(Filed Apr. 8, 2008)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, TERRY MICHAEL MILLER, was represented by Thomas C. Fagerberg and Larry Sauer.

The defendant was found guilty by a jury verdict on Count(s) S1 and S2 of the Superseding Indictment on January 17, 2008. Accordingly, the defendant is adjudged guilty of such Count(s), involving the following offense(s):

Title & Section	Nature of Offense	Offense Ended	Count (s)
18:111(a) & (b)	ASSAULTING CERTAIN OFFICERS	02/08/2006	S1
18:111(a) & (b)	ASSAULTING CERTAIN OFFICERS	02/08/2006	S2

As pronounced on APRIL 4, 2008, the defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant shall notify the Court and United States Attorney of any material change in the defendant's economic circumstances.

Signed this the 8th day of April, 2008.

/s/ Lee Yeakel
LEE YEAKEL
United States District Judge

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be

imprisoned for a term of TWO HUNDRED AND FORTY (240) MONTHS on Count S1 and TWO HUNDRED AND FORTY (240) MONTHS on Count S2 to be served concurrently with Count S1, except 60 months of Count S2 to be served consecutively to Count S1, to the extent necessary to produce a **total imprisonment term of 300 months**.

The Court makes the following recommendation(s) to the Bureau of Prisons: 1) designate defendant near Austin, Texas close to family members. If, for any reason, the Bureau of Prisons can not comply with any recommendation of this Court made in this Judgment and Sentence, the Bureau of Prisons shall notify the Court at once of its noncompliance and any reason therefor.

The defendant shall remain in custody pending service of sentence.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____
at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS on each of Counts S1 and S2 run concurrently.

While on supervised release, the defendant shall comply with the mandatory, standard and if applicable, the special conditions that have been adopted by this Court as set forth on pages 4 and 5 of this judgment.

X The defendant shall participate in a program approved by the United States Probation Office for treatment of narcotic addiction or drug or alcohol dependency which may include testing and examination to determine if the defendant has reverted to the use of drugs or alcohol. The defendant may be required to contribute to the costs of services rendered (copayment) in an amount to be determined by the probation officer, based on the defendant's ability to pay.

X The defendant shall participate in a program of mental health treatment, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer.

The defendant shall comply with the following special condition(s):

X The defendant shall refrain from the use of alcohol and all other intoxicants during the term of supervision.

CONDITIONS OF SUPERVISION

Mandatory Conditions:

1) The defendant shall not commit another federal, state, or local crime.

2) The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

3) In supervised release cases only, the defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

4) If convicted of a felony, the defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

5) The defendant shall cooperate in the collection of DNA as directed by the probation officer if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 1413a).

6) If convicted of a sexual offense as described in 18 U.S.C. § 4042(c)(4), the defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer.

7) If convicted of a domestic violence crime as defined in 18 U.S.C. § 3561(b), the defendant shall

participate in an approved program for domestic violence.

8) If the judgment imposes a fine or restitution, it is a condition of supervision that the defendant pay in accordance with the Schedule of Payments sheet of the judgment.

Standard Conditions:

1) The defendant shall not leave the judicial district without permission of the court or probation officer.

2) The defendant shall report to the Probation Officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the Probation Officer and follow the instructions of the Probation Officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the Probation Officer for schooling, training or other acceptable reasons.

6) The defendant shall notify the Probation Officer at least ten days prior to any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or

any paraphernalia related to any controlled substance, except as prescribed by a physician.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the Probation Officer.

10) The defendant shall permit a Probation Officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the Probation Officer.

11) The defendant shall notify the Probation Officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or special agent of a law enforcement agency without the permission of the Court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

14) If convicted of a sexual offense as described in 18 U.S.C. § 4042(c)(4), or has a prior conviction of a State or local offense that would have been an

offense as described in 18 U.S.C. § 4042(c)(4) if a circumstance giving rise to Federal jurisdiction had existed, the defendant shall participate in a sex offender treatment program approved by the probation officer. The defendant shall abide by all program rules, requirements and conditions of the sex offender treatment program, including submission to polygraph testing, to determine if the defendant is in compliance with the conditions of release. The defendant may be required to contribute to the cost of the services rendered (copayment) in an amount to be determined by the probation officer, based on the defendant's ability to pay.

15) The defendant shall submit to an evaluation for substance abuse or dependency treatment as directed by the probation officer, and if deemed necessary by the probation officer, the defendant shall participate in a program approved by the probation officer for treatment of narcotic addiction or drug or alcohol dependency which may include testing and examination to determine if the defendant has reverted to the use of drugs or alcohol. The defendant may be required to contribute to the cost of the services rendered (copayment) in an amount to be determined by the probation officer, based upon the defendant's ability to pay.

16) The defendant shall submit to an evaluation for mental health counseling as directed by the probation officer, and if deemed necessary by the probation officer, the defendant shall participate in a mental health program approved by the probation officer. The defendant may be required to contribute to the cost of the services rendered

(copayment) in an amount to be determined by the probation officer, based upon the defendant's ability to pay.

17) If the defendant is excluded, deported, or removed upon release from imprisonment, the term of supervised release shall be a non-reporting term of supervised release. The defendant shall not illegally re-enter the United States. If the defendant lawfully re-enters the United States during the term of supervised release, the defendant shall immediately report in person to the nearest U.S. Probation Office.

18) If the judgment imposes other criminal monetary penalties, it is a condition of supervision that the defendant pay such penalties in accordance with the Schedule of Payments sheet of the judgment.

19) If the judgment imposes a fine, special assessment, restitution, or other criminal monetary penalties, it is a condition of supervision that the defendant shall provide the probation officer access to any requested financial information.

20) If the judgment imposes a fine, special assessment, restitution, or other criminal monetary penalties, it is a condition of supervision that the defendant shall not incur any new credit charges or open additional lines of credit without the approval of the probation officer unless the defendant is in compliance with the payment schedule.

The Court further adopts such of the following special conditions applied to the supervised person by the judge at the time of sentencing:

1) **COMMUNITY CONFINEMENT:** The defendant shall reside in a Community Corrections Center for a period of ___ months to commence on _____. Further, once employed, the defendant shall pay 25% of his/her weekly gross income for his/her subsistence as long as that amount does not exceed the daily contract rate.

2) **HOME DETENTION:** The defendant shall participate in the Home Confinement Program for a period of ___ days/months. During this time the defendant shall remain at his/her place of residence except for employment and other activities approved in advance by the probation officer. The defendant shall maintain a telephone at his/her place of residence without "call forwarding," a "modem," "caller ID," "call waiting," or portable cordless telephones for the above period. At the direction of the probation officer, the defendant shall wear an electronic monitoring device and follow electronic monitoring procedures specified by the probation officer. The court further orders that the defendant shall pay for the costs of Home Confinement, as directed by the probation officer.

3) **COMMUNITY SERVICE:** The defendant shall perform ___ hours of community service work without pay, at a location approved by the probation officer, at a minimum rate of four hours per week, to be completed during the first ___ months of supervision.

CRIMINAL MONETARY PENALTIES/SCHEDULE

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth. Unless the Court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. Criminal Monetary Penalties, except those payments made through Federal Bureau of Prisons' Inmate Financial Responsibility Program shall be paid through the Clerk, United States District Court, 200 W. 8th Street, Room 130 Austin, Texas 78701.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

	Assessment	Fine	Restitution
TOTAL:	$200	$0	$3,000

Special Assessment

It is ordered that the defendant shall pay to the United States a special assessment of $200. Payment of this sum shall begin immediately.

Fine

The fine is waived because of the defendant's inability to pay.

Restitution

The defendant shall restitution in the amount of $3,000 through the Clerk, U. S. District Court, for distribution to the payee(s). The Court directs the U.S. Probation Office to provide personal identifier information of victim(s) by submitting a "reference list" under seal Pursuant to E-Government Act of 2002" to the District Clerk within ten (10) days after the criminal Judgment has been entered.

Name of Payee(s)	Amount of Restitution
K. Rybarski	$3,000

If the defendant is not now able to pay this indebtedness, the defendant shall cooperate fully with the office of the United Sates Attorney, the Bureau of Prisons and/or the United States Probation Office to make payment in full as soon as possible, including during any period of incarceration. Any unpaid balance at the commencement of a term of probation or supervised release shall be paid on a schedule of monthly installments to be established by the U.S. Probation Office and approved by the Court.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column above. However, pursuant to 18 U.S.C. § 3664(l), all non-federal victims must be paid before the United States is paid.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. §3614.

The defendant shall pay interest on any fine or restitution of more than $2,500.00, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. §3612(f). All payment options may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. §3612(g).

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

Effective: January 7, 2008

18 U.S.C.A. § 111. Assaulting, resisting, or impeding certain officers or employees

(a) In general. – Whoever –

(1) forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of official duties; or

(2) forcibly assaults or intimidates any person who formerly served as a person designated in section 1114 on account of the performance of official duties during such person's term of service,

shall, where the acts in violation of this section constitute only simple assault, be fined under this title or imprisoned not more than one year, or both, and where such acts involve physical contact with the victim of that assault or the intent to commit another felony, be fined under this title or imprisoned not more than 8 years, or both.

(b) Enhanced penalty. – Whoever, in the commission of any acts described in subsection (a), uses a deadly or dangerous weapon (including a weapon intended to cause death or danger but that fails to do so by reason of a defective component) or inflicts bodily injury, shall be fined under this title or imprisoned not more than 20 years, or both.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA,	§	**CRIMINAL No.**
	§	**A-06-CR-125 LY**
Plaintiff,	§	
	§	**SUPERSEDING INDICTMENT**
v.	§	
TERRY MICHAEL MILLER,	§	**(Filed May 1, 2007)**
	§	**[Violation: 18 U.S.C. § 111(a) & (b) – Assaulting and Interfering with Certain Officers.]**
Defendant.	§	
	§	**USAO No. 2006R01145**

THE GRAND JURY CHARGE:

COUNT ONE
18 U.S.C. § 111(a) & (b)
Assaulting Certain Officers/
Bodily Injury/Deadly Weapon

On or about February 8, 2006, in the Western District of Texas and elsewhere, the Defendant,

TERRY MICHAEL MILLER,

knowingly and by means and use of a deadly and dangerous weapon, that is, a vehicle: a green 2000 Ford F-150 pickup, did forcibly assault, resist, oppose, impede, intimidate, and interfere with Special Deputy United States Marshal Kevin Rybarski, hereby causing bodily injury, while he was engaged in his official duties, in violation of Title 18, United States Code, Section 111(a) & (b).

COUNT TWO
18 U.S.C. § 111(a) & (b)
Assaulting & Interfering with
Certain Officers/Deadly Weapon

On or about February 8, 2006, in the Western District of Texas and elsewhere, the Defendant,

TERRY MICHAEL MILLER,

knowingly and by means and use of a deadly and dangerous weapon, that is, a vehicle: a green 2000 Ford F-150 pickup, did forcibly assault, resist, oppose, impede, intimidate, and interfere with Deputy United States Marshal Darren Sartin while he was engaged in his official duties, in violation of Title 18, United States Code, Section 111(a) & (b).

A TRUE BILL:

SIGNATURE REDACTED
PURSUANT TO
E-GOVERNMENT ACT
OF 2002

FOREMAN.

JOHNNY SUTTON
United States Attorney

By: /s/ Michelle E. Fernald
MICHELLE E. FERNALD
Assistant United States Attorney

Sealed ____

Unsealed X USAO# **2006R01145**

Personal Data Sheet
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS

RELATED CASE __ YES X NO
RELATED CASE NO. _____

County: **AUSTIN** Division Judge: **Yeakel**

[5/1/07]
Date: ~~**03/06/07**~~ Mag Ct.# ___ SSN: ___ FBI# ___

Case No.: **A-06-CR-125-LY**
Assistant U.S. Attorney: **Michelle Fernald**

Defendant: **Terry Michael Miller** Date of Birth: ____

Defendant aka: _____

Address: _____

Citizenship: United States __ Mexican __ Other __

Interpreter Needed: Yes __ No __ Language _____

Defense Attorney: **Thomas Fagerberg** Employed _____

Address of Attorney:
1004 West Avenue, Austin, TX 78701 Appointed X

Defendant is: In Jail X
Where: **FCI Ft. Worth (medical treatment)**
On Bond __ Amt. of Bond __ Where: __

Date of Arrest: **06/19/06** Bench Warrant Needed ____

Prosecution By:
Information ___ Superseding Indictment X

Offense (Code & Description):
Cts. 1-2: 18 U.S.C. § 111(a) & (b) – Assaulting Certain Officers/ Bodily Injury/Deadly Weapon

Offense Is: Felony **X** Misdemeanor ___

Maximum Sentence: **Cts. 1-2: No more than 20 years, $250K fine, 3 years SR, $100 SA**

Penalty is Mandatory: Yes **X** as to SA [& minimum term of imprisonment] No ___

Remarks: **Case Agent: Rocky Wardlow, DPS Ranger**

N THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA	§	
	§	CRIMINAL NO.
V.	§	A-06-CR-125-LY
	§	
TERRY MICHAEL MILLER	§	

VERDICT

(Filed Jan. 17, 2008)

We, the jury, with regard to the Defendant, Terry Michael Miller unanimously find the following:

Answer "guilty" or "not guilty."

COUNT ONE: Guilty

COUNT TWO: Guilty

SIGNED on this 17 day of January, 2008, at 5 o'clock 00 m.

ORIGINAL SIGNATURE
REDACTED PURSUANT TO
E-GOVERNMENT ACT
OF 2002
PRESIDING JUROR

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UNITED STATES OF AMERICA	§	**NO. A-06-CR-125(01)LY**
	§	**(Filed Apr. 17, 2008)**
VS.	§	
	§	
TERRY MICHAEL MILLER	§	
	§	

NOTICE OF APPEAL

TO THE HONORABLE JUDGE OF SAID COURT:

INTO COURT comes the Defendant, TERRY MICHAEL MILLER, and files this his Notice of Appeal to the Fifth Circuit Court of Appeals from the judgment and sentence imposed in the above-styled and numbered cause as entered by the Court on April 7, 2008.

Respectfully submitted,

/s/ Thomas C. Fagerberg
THOMAS C. FAGERBERG
Attorney at Law
907 Rio Grande St.
Austin, Texas 78701
512/577-1962
State Bar No. 24034434

/s/ Larry Sauer
LARRY SAUER
Attorney at Law
1004 West Ave.
Austin, Texas 78701
512/479-5017
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Notice of Appeal has been furnished to Assistant U.S. Attorney, by hand delivery, on April 17, 2008

/s/ Larry Sauer
LARRY SAUER
Attorney at Law

U.S. District Court [LIVE]
Western District of Texas (Austin)
CRIMINAL DOCKET FOR CASE #:
1:06-cr-00125-LY-ALL

Case Title: USA vs. Miller **Date Filed:** 6/6/2006

* * *

Filing Date	#	Docket Text
6/6/2006 (p.16)	1	INDICTMENT(Redacted Version) filed. Unredacted document sealed pursuant to E-Government Act of 2002 as to Terry Michael Miller (1) count(s) 1. (mh,) (Entered: 6/8/2006)
		* * *
5/1/2007 (p.78)	33	SUPERSEDING INDICTMENT(Redacted Version) filed. Unredacted document sealed pursuant to E-Government Act of 2002 as to Terry Michael Miller (1) count(s) 1s, 2s. (Attachments: # (1) PDS) (jk,) (Entered: 5/3/2007)
		* * *
1/17/2008 (p.216)	68	JURY VERDICT (Redacted Version) as to Terry Michael Miller (1) Guilty on Count 1s,2s. filed. Unredacted Version Sealed pursuant to E-Government Act of 2002. (dm,) (Entered: 1/18/2008)
		* * *

4/8/2008 (p.220)	71	JUDGMENT AND COMMITMENT as to Terry Michael Miller. Signed by Judge Lee Yeakel. (dm,) (Entered: 4/9/2008)
		* * *
4/17/2008 (p.236)	77	NOTICE OF APPEAL by Terry Michael Miller (mh,) (Entered: 4/17/2008)
		* * *
4/21/2008 (p.240)	79	CJA 20 as to Terry Michael Miller: Appointment of Attorney Ryan Bates for Terry Michael Miller.. Signed by Judge Lee Yeakel. (mh,) (Entered: 4/22/2008)
		* * *